telephone marketing and customer care service expertise maintained by most telephone companies, including its ILEC competitors and AT&T.[59]

Thus, although MediaOne has begun a roll-out of cable telephony, it has achieved only modest success. MediaOne today has only approximately 26,000 telephone customers, despite having invested approximately $4.1 billion to upgrade its system to provide additional services, including cable telephony.[60] In the areas where MediaOne has upgraded its broadband network, MediaOne is achieving a penetration level of less than 3 percent of the homes ready for its telephone service. Moreover, MediaOne has determined that, on its own, the company will be able, at best, to achieve only the most modest penetration levels in local telephone exchange and exchange access services in the next several years, and that it will not reach significant penetration for almost a decade.

The reasons for MediaOne's low telephony penetration and slow projected growth are straight-forward. Consumers are, understandably, reluctant to purchase basic telephone services from a company without an established reputation for providing reliable, high quality telephone service. As a new entrant, and a cable company, MediaOne has no established reputation as a reliable telephone service provider. For example, one recent national survey found that while 65 percent of consumers would consider switching to a long distance carrier for

[59] As with all CLECs, another significant obstacle to entering local telephony service has been MediaOne's dependency on the ILECs for essential elements of its service. MediaOne has encountered serious and extensive problems with the ILECs in the areas of interconnection, number portability, access to new telephone numbers, access to wiring in multiple dwelling units, and access to ancillary services, such as directory assistance, support services, repair, and intraLATA toll service.

[60] MediaOne projected completion of the upgrade of most of its local networks by the end of the year 2000.

local service, only 19 percent would use a cable company.[61] MediaOne's own internal analysis likewise has shown that consumers view telephone companies in general, and AT&T in particular, as having a greater reputation for quality and service.

AT&T's established telephony brand will improve both the overall penetration level that can be achieved by MediaOne and shorten the time period in which that level can be achieved. In a recent assessment of telecommunication brand images, IDC/LINK reported that "AT&T received the highest consumer confidence ratings nationwide" and consumers selected AT&T as the company that they were most likely to use as their primary provider of telecommunications services (including local, long distance, and wireless).[62]

In addition, providing facilities-based telephone service is a highly complex endeavor, requiring not only sophisticated engineering expertise, but also organizational structures that are capable of quickly responding to consumer demands. While MediaOne has begun to develop these skills and knowledge, there is much it can learn from AT&T. For example, MediaOne will gain the expertise AT&T has developed in managing today's sophisticated telephone networks, including the integration of local, long distance, and international networks along with the integration of circuit switched and packet switched networks. Similarly, MediaOne will have access to AT&T's highly sophisticated telephone marketing and customer care expertise and organizational structures.

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[61] "Alternatives for Phone Service," USA Today, at A1 (May 13, 1999).

[62] *Residential Telecommunications Brand Image Assessment 1998*, IDC/LINK Report (July 1998).

The Merger also will accelerate MediaOne's deployment of a new, more efficient architecture for providing cable telephony. Currently, MediaOne's cable telephony network employs a standard hybrid fiber coaxial cable ("HFC") architecture that uses circuit switching technology. Packet switching, using IP technology, promises to reduce substantially the costs of providing local telephone services because circuit switches hold dedicated circuits open (and thereby make scarce capacity unavailable) during the duration of a phone call even when there is no information being transmitted. By contrast, packet switches can route multiple calls through the same channel as well as route the same call through multiple channels. Moreover, IP telephony will make it easier to integrate voice grade traffic with data networks, thereby eliminating the need to have multiple, redundant networks for the separate services.

As AT&T explained in the TCI proceeding, while AT&T has begun deploying circuit switches in its existing cable network in certain cases to initiate service immediately, it intends to transition to a packet switched network as soon as possible. Indeed, AT&T is in the advanced stages of developing and testing the necessary equipment to provide IP telephony. Thus, the Merger will bring the significant benefits of IP telephony to consumers in MediaOne's territories much sooner than if MediaOne were to try to deploy this architecture on its own.

Finally, the Merger will increase the strength of MediaOne's competitive telephony offerings because MediaOne will be able to access AT&T's existing network infrastructure. Through its acquisition of Teleport, AT&T has local facilities in a number of the same cities MediaOne's cable facilities serve. With those facilities, AT&T is able to connect some of its customers directly to its long distance network and thereby avoid ILECs' exchange access facilities and access charges. Moreover, AT&T is able to use Teleport's assets to interconnect to incumbent networks at end offices rather than at tandem switches, thereby avoiding tandem switch and shared transport charges. In contrast, MediaOne has few transport facilities and must generally interconnect to incumbent networks through tandem switches (for both local exchange and exchange access calls). Hence, by enabling MediaOne to utilize AT&T's existing local infrastructure, the Merger will allow MediaOne to interconnect more efficiently to incumbent networks and thereby become a lower cost and more effective local competitor.

For its part, AT&T gains more from MediaOne than simply its last mile cable assets. Although AT&T's general telecommunications expertise will assist the speed and potency of MediaOne's cable telephony offering, MediaOne has developed a knowledge base that can be transferred to AT&T to enhance AT&T's ability to provide cable telephony on the TCI system. As discussed above, AT&T intends to upgrade TCI's facilities to provide IP-based cable telephony. However, in the interim, it will use the same circuit switching architecture that is currently being used by MediaOne. In fact, MediaOne already has upgraded about half of its systems to provide for the initiation of cable telephony and has started providing services in seven of its service areas. AT&T will benefit from MediaOne's experience in deploying these facilities and using them to provide local telephone service.

For example, HFC architecture requires all data and telephony users to share limited signal space through random allocation of space based on immediate demand. Moreover, there are significant differences (both in quantity and in variations) between upstream demand (traffic generated from the customer) and downstream demand (traffic carried to the customer). Ensuring that sufficient capacity exists in the network, while at the same time not investing in unnecessary capacity, is therefore a central issue in the management of cable telephone networks. With the Merger, AT&T will acquire the experience MediaOne has gained in managing bandwidth congestion on its network.

AT&T can also utilize existing MediaOne facilities to "jump start" cable telephony on neighboring TCI facilities. In several regions of the country, including the Miami-Fort Lauderdale area, MediaOne cable systems that have been upgraded to provide cable telephony adjoin TCI systems that are in the process of being upgraded. This means that AT&T can connect the distribution hubs in the TCI system to MediaOne's existing, upgraded headend offices. Not only does this mean that AT&T will achieve greater efficiencies because it will not have to duplicate the headend equipment – such as the local switch, DC power supply, and the routers and servers used to connect to the Internet – but it will also enhance AT&T's speed to market, thereby allowing it to bring the benefits of local competition even sooner.

Beyond increasing the speed and competitiveness of AT&T's cable telephony, the Merger will increase the geographic scope in which AT&T can offer local service. Although AT&T's purchase of TCI will bring local telephone choice to millions of residential consumers in several major markets, the TCI transaction only gave AT&T access to customers in those cities where TCI actually has cable facilities. By acquiring MediaOne, AT&T will gain *immediate* access – and the ability to provide competitive, facilities based local exchange services – to millions of consumers in service areas where it currently has no facilities and cannot provide competitive local telephony offerings.

Finally, the Merger will create economies in providing local exchange services in competition with ILECs. As AT&T demonstrated in the TCI proceeding, enormous investment is required to develop and deploy effective cable telephony facilities and services.[63] Deployment of cable telephony requires a large fixed investment in the development of engineering protocols and operating standards and practices; construction and furnishing of central offices, transport facilities and databases; hiring and training of installation and maintenance crews; and establishment and staffing of customer care centers. Similarly, the costs of marketing new services to residential consumers are substantial. The Merger will allow AT&T to spread such costs over a wider base.

In this regard, it is important to recognize the fundamental differences between ILECs and cable providers. Although completion of the Merger will give AT&T a "footprint" roughly the same size as an Ameritech-SBC-PacBell, AT&T for several reasons will begin with many *fewer* customers than such an ILEC. First, cable and telephone service have dramatically different penetration rates: on average, 94 percent for telephone and 65 percent for cable television. Thus, even when a cable company passes as many houses as a telephone company, it has almost 30 percent fewer customers. Second, as a new entrant into telephony, cable companies start with *no* telephone customers. Third, cable companies must expend enormous sums of money to research, develop and implement broad scale cable telephone networks while ILECs already have ubiquitous, working networks in place. Thus, to achieve the same economies of scale as, and to compete on an equal footing with, ILECs, cable companies must be permitted to achieve footprints as least as large, or larger, than these large ILECs.

Internet. Just as the Merger will provide economies of scale and scope that will allow the merged entity to provide competitive local telephone service more expeditiously than

[63] *See AT&T-TCI* ¶ 147.

either entity could individually, the Merger also will expedite AT&T's ability to provide content-enriched high-speed Internet cable services.

First, the upgrades that are required to provide local telephone service over cable plant are also necessary to provide cable Internet services over these same facilities. By expediting the rollout of competitive local telephone services, the Merger also hastens the investments necessary for widespread deployment of cable Internet services.

Second, investment by AT&T will spur investment by competitors, and lead them to provide additional services and decrease their prices. The Commission has noted that investment in broadband facilities by cable operators and CLECs "appears to have spurred incumbent LECs to construct competing facilities."[64] Indeed, this appears to be the case in markets around the country, where ILECs have lowered prices and expanded coverage areas only in response to the entry of substantial competitors.[65]

Video. By enabling AT&T to offer packages of telephone, video, and data services on an expedited basis to millions of American consumers, the Merger will provide

[64] Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, ¶ 42 & n.84 (FCC Feb. 2, 1999) ("*706 NOI Report*").

[65] *See, e.g.*, Mike Farrell, *PacBell to Lower DSL Rates in Calif.*, Multichannel News, November 23, 1998. In other markets where cable operators have initiated broadband service, the incumbent carriers quickly followed suit. For example, @Home launched service in San Francisco in September 1996 and San Diego in May 1997, and Pacific Bell followed in November 1997 and September 1998, respectively. *See Pacific Bell's ADSL-Internet Access Packages Now Available to 180 California Communities* <www.sbc.com/PB/NewsArticle.html?query_type=articlequery=19990901-01>. Likewise, after @Home launched service in Phoenix in May 1997 and Denver in June 1998, US WEST followed in January 1998 and June 1998, respectively. *See US WEST Launches Ultra-Fast DSL Internet Service in Twin Cities; Continues Roll Out* <www.uswest.com/news/051398b.html>.

additional motivation for ILECs and others to step up their efforts to provide competing video programming to end users. The Merger also will accelerate the development and deployment of digital cable technology on MediaOne systems. While AT&T has been a leader in deploying digital technology domestically, MediaOne generally has chosen to focus on increasing the analog capacity of its cable systems. The benefits of digital technology are well known to the Commission. Most importantly, digital technology greatly increases a cable system's capacity and allows the cable operator to bring many more services to consumers, including local and regional programs, niche channels that may be of interest to a small segment of the audience, minority programming, and other diverse services. Digital technology also benefits programmers by creating new opportunities for the distribution of their product.

Clustering. The Merger also serves the public interest by increasing clustering, which will produce pro-competitive efficiencies with regard to all services. As a result of this Merger and the exchange of cable systems with Comcast, AT&T will add network clusters in a number of important service areas. Clustering increases local management, fosters regional programming services, such as enriched local news and sports offerings, enhances compatibility of set-top boxes, lowers maintenance and operating costs, allows more efficient architecture and reduces per-customer marketing costs. Clustering further facilitates the offering of new interactive video services because smaller systems must otherwise bear the cost of either unused file server capacity or use smaller, less efficient servers. Clustering is also essential to the efforts of AT&T to compete with geographically concentrated incumbent LECs because clustering reduces the per-customer cost of providing local telephony. It is precisely for these reasons that the Commission has concluded that clustering provides significant economic benefits to consumers that outweigh any conceivable harms.[66]

B. These Benefits Cannot Be Achieved Independent Of The Merger

These pro-competitive benefits cannot be achieved on the same scale or as expeditiously absent AT&T's acquisition of MediaOne. As noted above, although MediaOne has begun offering cable telephony in several areas, it has achieved only limited penetration to date and its marketing studies show that consumers remain strongly reluctant to buy telephone service from a cable company. By contrast, for the reasons explained above, combining the complementary assets of AT&T and MediaOne will greatly accelerate and strengthen MediaOne's cable telephony offering.

Similarly, without the transaction, AT&T would be required either to duplicate MediaOne's extensive facilities or to attempt to contract with MediaOne to allow AT&T to lease its facilities to provide cable telephony. The former is economically infeasible, and deprives the public of the benefits in cost reduction and efficiencies generated by the Merger. The latter, as explained below, is, at best, an imperfect solution that would result in much less substantial economic benefits than full integration.

Contractual relationships, even where feasible, are much less efficient than full integration when the parties are trying to deal with rapidly evolving technologies and service.

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[66] Fourth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd. 1034, ¶ 140 (1998) ("*Fourth Annual Video Competition Report*"); Second Report and Order, *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 8565, ¶ 17 (1993) ("*Cable Ownership Limits Order*").

This is particularly true where, as here, there is technology and service *convergence* – no one can predict very far into the future what technologies and services are going to develop increased demand and what that means for efficient allocation of cable bandwidth. Without knowing the answers to these questions, potential joint venture partners have difficulty resolving how much bandwidth would be reserved for services to be provided by one joint venturer and how much bandwidth would be reserved for services to be provided by the other joint venturer.

An undefined arrangement in this area is highly problematic because of the large contract-specific investments that must be made early in the project. As noted above, rollout of cable telephony and other cable services requires large initial investments in research and development, licenses and permitting, acquisition of real estate and capital assets, installation of cable and customer premises equipment, marketing and advertising, and staffing of customer care centers. Many of these investments, once made, are contract-specific (they could not be redeployed elsewhere by a party that withdrew from the project) and sunk (they could not be recovered even upon termination of the project). The rapid growth and change in technology and demand for service, the convergence of services, and the high costs associated with initiating service efforts all impact negatively on contractual allocation of the broadband network, especially for new entrants competing against well-established competitors such as ILECs. Accordingly, the most efficient option – the one that promises the most benefits to consumers in the shortest time – is for AT&T and MediaOne to merge and let consumer demand and market forces determine how bandwidth should be used.

V. COMPETITIVE ANALYSIS

The product markets possibly relevant to an analysis of the Merger include: (1) local exchange and exchange access services; (2) domestic long distance services; (3) United States international telephone services; (4) wireless telephone services; (5) multichannel video programming distribution ("MVPD"); (6) video programming; and (7) Internet access.

A. Local Exchange And Exchange Access Services

Residential Telephone Services. The Merger will greatly enhance competition for residential local exchange and exchange access services by enhancing the ability of AT&T and MediaOne to provide facilities-based local telephone service to mass market customers. As the Commission has recognized, "incumbent local exchange carriers are the sole actual providers of local exchange and exchange access services to the vast majority of residential and small business customers in most areas of the United States."[67] In 1997, ILECs earned more than 98 percent of all local exchange and local exchange access revenues nationwide, with competition from CLECs generally focusing on large business customers in large urban areas.[68] In February of this year, the Commission estimated that ILECs still earn at least 95 percent of all local exchange and exchange access revenues.[69] Within the last year, the Commission acknowledged that, regardless of the development of some competition for the largest business customers, it could find little evidence of any actual competition to the ILECs with respect to the provision of

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[67] *AT&T-Teleport* ¶ 21; *see also AT&T-TCI* ¶ 46 (recognizing dominance of ILECs in the provision of mass market telephone service).

[68] *AT&T-Teleport* ¶ 24 n.80; *1999 Trends* at 9-2.

[69] *1999 Trends* at 9-1.

mass market local telephone service;[70] the merger of AT&T and TCI provided the only such hope.

AT&T and MediaOne taken together today provide only a tiny fraction of residential local exchange and exchange access service across the United States. AT&T has approximately 220,000 local telephone service customers throughout the United States, with almost all of those customers receiving resold local ILEC telephone service. While AT&T is in the process of upgrading TCI's cable facilities and initiating new facilities-based local telephone service in service areas like Fremont, California, AT&T has no more than 15,000 such customers in Fremont and San Jose, California; Arlington Heights, Illinois; Dallas, Texas; and Hartford, Connecticut. For its part, MediaOne currently has approximately 26,000 local telephone service customers in Atlanta, Georgia; Boston, Massachusetts; Jacksonville and Pompano Beach, Florida; Detroit, Michigan; Los Angeles, California and Richmond, Virginia. As these figures indicate, AT&T and MediaOne do not currently serve the same service areas or compete with each other in the provision of facilities-based local telephone service in any service area.[71] As a consequence, the proposed Merger will not result in any diminution of competition for local telephone service in the areas served by AT&T and MediaOne.

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[70] *AT&T-Teleport* ¶ 24 n.81. In February of this year, the Commission estimated that CLECs control less than 3 percent of the switched access lines nationwide, and that while CLECS are deploying fiber optic systems, they still only control approximately 11 percent of that capacity. *1999 Trends* at 9-1, 9-2.

[71] AT&T does provide a limited amount of resold local telephone service in Georgia, where MediaOne has initiated local telephony offerings. MediaOne, however, has approximately 5,000 customers in this service area, and AT&T is no longer marketing its resold ILEC local telephony.

Moreover, all of the relevant service areas are dominated by the ILECs, which have considerably more than 90 percent of the customers and revenue in the service areas where MediaOne and AT&T provide local telephone service. Each of the major ILECs with which the merged AT&T-MediaOne will compete has *millions* of customers in these areas. In Georgia, for example, AT&T and MediaOne together serve less than 15,000 local customers through facilities-based service and resale. BellSouth, by contrast, reported more than 4.15 million subscriber lines in Georgia as of the close of 1998, slightly less than 85 percent of all local telephone lines in Georgia.[72] Almost all of the remaining 15 percent of local telephone lines were held by other incumbent local telephone companies.[73] Thus, even where both AT&T and MediaOne have initiated some residential local exchange service, they remain very small, and face a dominant competitor, which has over 100 times as many customers.[74]

As discussed above in Section IV, instead of inhibiting competition, the Merger unquestionably will promote competition in the provision of local residential telephone service in areas where MediaOne has existing network infrastructure. As a result of the Merger, AT&T and MediaOne together will be able to provide more competitive facilities-based local telephone services to more consumers much faster than AT&T or MediaOne independently could provide such service.

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[72] *Trends in Telephone Service*, at 98 (CCB July 1998) ("*1998 Trends*").

[73] In 1997, 35 other independent local telephone companies reported approximately 700,000 additional lines in Georgia. *Id.*

[74] Moreover, as the Commission found in *AT&T-TCI*, cable companies like MediaOne have "no special incentives, assets, or capabilities" outside of their cable service areas that would ordinarily suggest that they would compete with AT&T's current cable telephony efforts in the provision of local telephone service. *AT&T-TCI* ¶ 45.

Business Telephone Services. The Merger also will not impede competition for the provision of local exchange and exchange access services to businesses. As with residential service, the Commission has found that "[i]ncumbent LECs also continue to dominate the larger business market for local exchange and exchange access services."[75] AT&T and MediaOne, by contrast, presently provide a very limited amount of local exchange and exchange access services to larger businesses in the United States. Indeed, the ILECs still earn in excess of 90 percent of the business revenues from the provision of local exchange services, and still control approximately nine times the number of fiber miles controlled by new entrants.[76] AT&T, after its acquisition of Teleport, does seek to compete with the ILECs in the provision of local business telephony, but AT&T's share of local revenue in business local exchange services has never exceeded four percent in any area.[77] MediaOne has never been or even sought to be a significant provider of telephony services to businesses.[78] In Atlanta, for example, where MediaOne currently serves approximately 5,000 local telephony customers, less than 250 of these are businesses.

[75] *AT&T-Teleport* ¶ 26.

[76] *See 1999 Trends* at 9-2; Table 9.1, Chart 9.1; *AT&T-Teleport* ¶ 27.

[77] *AT&T-Teleport* ¶ 36.

[78] TWT, in which MediaOne has a 19 percent interest, has sought to compete as a CLEC in the provision of local business telephone services, but, like other CLECs, has attained only very small shares of that business. For its 1998 fiscal year, TWT earned approximately $122 million in total revenues from operations in its 20 cities. Time Warner Telecom Prospectus, at 11 (May 11, 1999). Even in the territories where Teleport and TWT both operate as CLECs, their combined market share of local revenue and customers does not exceed four percent and the ILEC competitor still dominates service. Moreover, numerous other CLECs have begun to provide service in these cities. *See AT&T-Teleport* ¶ 27.

Further, even beyond the dominant ILECs, "numerous new entrants are rapidly entering this market, especially in central business districts in urban areas, and . . . any number of these other new entrants have both the capabilities and the incentives to compete effectively."[79] These other new entrants will be "at least as significant a competitive force as either of the merging parties."[80] The Merger therefore will not significantly affect competition in the provision of local business exchange and exchange access services.

B. Domestic Long Distance Services

The Merger poses no threat to competition in the provision of long distance services because MediaOne is not a competitor for this service. MediaOne does not provide long distance service, and where it provides local telephony, its customers may select a long distance provider from among those companies offering such service. Additionally, as the Commission has recognized, AT&T's share of long distance services has declined steadily over the past 15 years, justifying AT&T's reclassification as non-dominant in 1995.[81] As summarized in a recent Commission report, "[s]ince mid-1984, AT&T's traffic has grown at a slower rate than the industry average: its minutes have doubled during that period while the minutes for other carriers have increased tenfold. As a result, AT&T's share of long distance access minutes has fallen

[79] *AT&T-Teleport* ¶ 27. As the Commission recognized in *Teleport*, in AT&T's top ten service areas there were between five and 12 operational CLECs, including Focal Communications Corp.; Metromedia Fiber Networks; MelTel; RCN Corporation; USN Communications, Inc.; WinStar Communications, Inc., and MCI-WorldCom, Inc. *Id.*

[80] *Bell Atlantic-NYNEX* ¶ 58; *AT&T-Teleport* ¶ 27. *See also AT&T-TCI* ¶ 50 (combination of a cable firm and AT&T will not eliminate any scarce assets or capabilities).

[81] Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd. 3271, ¶ 1 (1995).

sharply."[82] In short, the Merger will have no measurable effect on the vigorously competitive supply of domestic long distance services.

C. International Telephone Service

The Merger likewise will not reduce competition for the provision of international telephone services. As with domestic long distance service, MediaOne is not a participant or a previously precluded competitor for the provision of international telephone service, and AT&T is a nondominant carrier with declining share. Further, the Commission correctly has not considered incumbent cable television operators in general to be significant actual or potential competitors for this service.[83]

D. Mobile Telephone Service

AT&T, through its subsidiary AT&T Wireless, provides CMRS throughout the United States. AT&T Wireless operates and holds interests in CMRS systems in 26 of the largest 30 service areas in the United States. MediaOne and its subsidiaries do not provide CMRS. MediaOne holds a passive, less than five percent interest in Vodafone, which operates and holds interests in CMRS systems in 22 of the 30 largest service areas in the United States.[84]

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[82] *1999 Trends* at 11-1. AT&T's share of long distance operating revenues fell from 90.1 percent in 1984, to 51.8 percent in 1995 when AT&T was declared non-dominant, and still further to 44.5 percent in 1997. *Long Distance Market Shares – Fourth Quarter 1998*, at 16 & Table 3.2 (CCB March 1999).

[83] *Bell Atlantic-NYNEX* ¶ 87; *BT-MCI* ¶¶ 82-83.

[84] Vodafone recently acquired AirTouch. MediaOne had acquired an interest in AirTouch as part of the consideration for the merger with AirTouch of MediaOne's CMRS systems originally acquired from U S WEST.

Given the competitive nature of the CMRS marketplace and the inconsequential level of MediaOne's equity interest in Vodafone, the proposed Merger will not reduce competition in the CMRS marketplace. First, as the Commission has recognized, there are numerous competitors providing CMRS in each service area. "There are now at least five mobile telephone providers in each of the 35 largest Basic Trading Areas (BTAs), and at least three mobile telephone providers in 97 of the 100 largest BTAs in the United States."[85] In areas where AirTouch and AT&T provide CMRS, there are at least three or four competitors currently providing service.[86] Moreover, in each service area, there are at least five CMRS competitors licensed to provide service: two cellular providers with at least 25 Mhz are licensed in each cellular service area, and three PCS service providers with at least 30 Mhz are licensed in each PCS service area.[87] The Merger raises no conceivable consumer harms in the intensely competitive wireless industry.

Second, AT&T's potential indirect ownership of less than a five percent interest in Vodafone is not sufficiently significant to influence the activities of Vodafone. To promote competition and address concerns about anticompetitive behavior among CMRS systems, the Commission has adopted a CMRS spectrum cap that limits the amount of CMRS spectrum that can be held by a single entity in a particular geographic area.[88] Specifically, Section 20.6 of the

[85] News Release, *FCC Adopts Fourth Annual Report of State of Wireless Competition*, WT Report No. 99-13 (FCC June 10, 1999).

[86] *See* <www.app.airtouch.com/about/cellular_pcs.html>.

[87] Prior to its merger with Vodafone, AirTouch recognized the potential for up to nine competitors in each of its service areas, including SMR operations and other allocations for PCS. *See id.*

[88] 47 C.F.R. § 20.6. The CMRS spectrum cap is the subject of a pending rulemaking proceeding. *See* Notice of Proposed Rulemaking, *1998 Biennial Regulatory Review – Spectrum*

(Continued . . .)

Commission's rules (the "Spectrum Cap") prohibits an entity from having an attributable interest in a total of more than 45 Mhz of CMRS spectrum licensed for cellular, broadband PCS, and Specialized Mobile Radio with significant overlap in any geographic area.[89] Stock ownership is not attributable, however, unless it amounts to 20 percent or more of the equity or voting stock of the CMRS licensee in the service area, or otherwise constitutes control of the licensee.

Because MediaOne's interest in Vodafone is far below the 20 percent attribution level, the proposed Merger will not cause AT&T to violate the Commission's Spectrum Cap. Moreover, MediaOne's interest in Vodafone's CMRS systems has been brought below five percent; MediaOne exercises no control or influence over the domestic operations of Vodafone, and is not involved in the management of Vodafone or its CMRS operations. In fact, MediaOne has "monetized" most of its stockholdings in Vodafone, further reducing any real interest in its CMRS operations.[90] Given the level of MediaOne's equity interest in Vodafone and its compliance with the Spectrum Cap, no competitive CMRS issues are raised by the proposed Merger.[91]

(. . . Continued)
Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205 (FCC Dec. 10, 1998) ("*CMRS Spectrum Cap NPRM*").

[89] 47 C.F.R. § 20.6(a). Significant overlap of a PCS and cellular service area is defined as a ten percent population overlap. *Id.* § 20.6(c)(1).

[90] A "monetization" is a transaction that permits a company to capture the value of the gains of an appreciated asset, such as common stock of another company that it owns, while deferring the capital gains that would accompany an outright sale. MediaOne has monetized more than two-thirds of its Vodafone shares and it is in the process of monetizing the remaining shares. Thus, while MediaOne continues to own these Vodafone shares, much of the economic interest in these shares has been transferred to other investors.

[91] AT&T may require a temporary waiver of Section 22.942 of the Commission's rules if Section 22.942 remains in effect. Section 22.942, which was adopted before the Commission's allocation of spectrum for PCS, when there were only two cellular licensees in each market,
(Continued . . .)

E. Multichannel Video Programming Distribution

AT&T's acquisition of MediaOne will not eliminate or reduce competition in the MVPD marketplace. With very minimal exception, there is no geographic overlap between AT&T's cable systems and MediaOne's systems.[92] Applicants currently believe that, among the territories in which both AT&T and MediaOne have authority to offer cable service, the only actual overbuilds are in discrete sections within the Atlanta, Georgia MSA (Powder Springs, Fayetteville, Fulton County and Peachtree City).[93] In total, it appears that fewer than 3,000

(. . . Continued)

prohibits an entity from having an ownership interest in licensees for both channel blocks in overlapping cellular service areas unless the interests pose no substantial threat to competition. 47 C.F.R. § 22.942. AT&T Wireless and Vodafone have interests in both channel blocks in 37 cellular service areas in California, Colorado, Idaho, Minnesota, Nevada, Oregon, Utah, and Washington.

In adopting Section 22.942, the Commission determined that interests of less than five percent would not implicate the rule in circumstances where control was not present. *Id.* § 22.942(a). MediaOne's interest in Vodafone does not convey any rights to influence, much less control, Vodafone. In addition, now that Vodafone has acquired AirTouch, MediaOne's passive investment in Vodafone still will not pose any threat to competition, much less a substantial threat. As part of its *CMRS Spectrum Cap NPRM*, the Commission is reconsidering the continued need for Section 22.942. Since Section 22.942 was adopted, the Commission has allocated an additional 120 Mhz for PCS services and adopted rules that permit SMR operators to provide CMRS services that also compete with cellular services. In such circumstances, it is difficult to reconcile the Spectrum Cap limit of 20 percent, which permits ownership in overlapping PCS and cellular systems, with a different limit that would prohibit ownership of less than a 5 percent interest in overlapping cellular systems. If a waiver is necessary, AT&T would commit to bring itself into compliance with whatever rule is adopted by the Commission in the *CMRS Spectrum Cap NPRM* proceeding.

[92] The analysis in this section focuses on cable systems in which AT&T or MediaOne have a 50 percent or greater ownership interest.

[93] Other than in the Atlanta service areas, AT&T and MediaOne each hold franchises to operate cable systems in common territories within seven service areas: Riverside-San Bernardino, California; Peoria-Pekin, Illinois; Ann Arbor, Michigan; Miami, Florida, Chicago, Illinois, Kankakee, Illinois, and Lansing/E. Lansing, Michigan. However, proposed exchange transactions between AT&T and MediaOne that will eliminate the overlaps in Miami, Chicago, Kankakee, and Lansing/East Lansing have already been cleared by the antitrust authorities,

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homes in those franchise areas have actually been overbuilt. Given this insignificant degree of overlap, a combination of AT&T and MediaOne would have at most a *de minimis* impact on MVPD competition and clearly would pale in comparison to the substantial public interest benefits and efficiencies to be realized by the Merger, including the acceleration of local telephony competition.[94]

In fact, the Merger likely will *increase* MVPD competition. By enabling AT&T to provide packaged (as well as separate) voice, video, and Internet services to millions of American consumers on an expedited basis, the Merger will increase the incentive of local telephone companies and others to compete in the provision of multichannel video services. In such an environment, ILECs and others will be motivated to upgrade their networks to enable them to provide comparable packages that include video programming as well as other types of services. Indeed, there already is evidence that AT&T's plans to provide service packages are causing ILECs to seek ways to offer multichannel video services along with their traditional telephony services. For example, both SBC and Bell Atlantic have partnered with DirecTV to

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pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). The required HSR notification (Transaction No. 19990624) was filed on November 25, 1998, and the waiting period expired on December 25, 1998. Similarly, MediaOne has entered into definitive agreements for transfers to Time Warner that will eliminate overlaps with AT&T in Riverside-San Bernardino, with the exception of franchise territories in which there is no overbuild. These transfers also have received clearance under the HSR Act. The HSR notification (Transaction No. 19991719) was filed on March 1, 1999, and the waiting period terminated on March 31, 1999. The two remaining MSAs known to the parties to contain common territories – Ann Arbor, and Peoria-Pekin – contain no overbuilds.

[94] *See supra* Section IV for a discussion of the substantial public interest benefits created by the Merger.

offer bundled services to customers throughout their service areas.[95] The Merger thus should stimulate MVPD competition rather than restrain it.[96]

F. Video Programming

The Merger will have no anti-competitive effects in the thriving video programming marketplace. The Merger will result in little real consolidation of programming interests, and AT&T will, in any event, remain a relatively small video programming player. Nor will the Merger create a video programming *buyer* even remotely large enough to exercise monopsony power or to engage in vertical foreclosure. Finally, the Merger will not result in the violation of any currently effective statute or rule directed at video programming concerns. Applicants recognize, of course, that horizontal cable ownership limit issues are before the Commission in two pending industry-wide proceedings. Applicants analyze below the impact of the Merger under various proposals made in those proceedings and demonstrate why such generic proposals – animated by monopsony power and vertical foreclosure concerns that simply

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[95] *Bell Atlantic Introduces Television Service for Apartment, Condominium, Co-op and Townhouse Residents*, (Sep. 14, 1998) <www.ba.com/nr/1998/Sep/19980914002.html>. *See also Bell Atlantic Brings Its New TV Service to Pittsburgh, Offering Consumers an Alternative to Cable*" (May 24, 1999) <www.ba.com/nr/1999/May/19990524004/html>; DirecTV Press Release, *SBC Communications, DirecTV, and USSB Sign Agreements to Offer Digital Satellite TV Service in Apartment Complexes* (Mar. 2, 1998) <www.directv.com/news/swbdeal.html>.

[96] In fact, it is important to note that, notwithstanding the increased size of various multiple systems operators ("MSOs") as a result of the mergers and clustering in the cable industry over the last few years, none of this activity has slowed the growth of cable competitors or diminished competition in the MVPD marketplace. To the contrary, MVPD competition has *increased* during this period. In part, this is because DBS operators, telephone companies, and other MVPDs are responding to the increased investment by cable MSOs in programming, additional channel capacity, and expanded network size. This evidences the true competition existing in the marketplace.

are not present here – should pose no obstacle to expeditious approval of the proposed Merger and the resulting transfer of control of FCC authorizations and licenses.

1. The Merger will have No Adverse Effects on Competition in the Provision of Video Programming

For a variety of reasons, the Merger will not significantly increase concentration in the ownership of video programming and therefore will have no adverse effects on competition in the video programming marketplace.[97]

First, as shown above, the structural and operational separation between Liberty and AT&T means that the Merger does not result in a combination of the Liberty and MediaOne programming interests. To the contrary, after the Merger, the programming interests of Liberty will be controlled and managed entirely separately from the MediaOne programming interests held by AT&T.[98]

Second, following the Merger, AT&T will have a purely passive 25.51 percent limited partnership interest in TWE. AT&T will have no input into the management of the TWE cable systems or the TWE programming interests.[99]

Third, with regard to the remaining programming services to be combined by the Merger (except two regional programming services, New England Cable News and Fox Sports

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[97] The programming interests of AT&T and MediaOne are described above in Section II.

[98] It is important to stress that AT&T's interest in Liberty, Liberty's ownership interest in Time Warner, Inc., and AT&T's interest in Cablevision/Rainbow were all before the Commission when it addressed the AT&T-TCI merger, and the Commission found no adverse competitive impact on the video programming marketplace.

[99] *See infra* Section II(B).

New England in which AT&T has a 50 percent interest), AT&T will have only a minority (in some cases very small), indirect interest, with neither control nor management rights. The combination of these interests simply is not significant enough to create a concern about a material increase in the concentration of the programming marketplace.

Fourth, competition in the video programming business is thriving. The Commission has identified 245 national satellite-delivered video services,[100] many of which are owned by large, well-funded, and experienced media companies, such as Disney, Viacom, and NBC. The combination of the limited programming interests held by AT&T and MediaOne will not materially affect competition in such a highly competitive and robust marketplace.

2. AT&T-MediaOne will have No Ability to Exercise Monopsony Power or Engage in Vertical Foreclosure

AT&T will have no ability, after the Merger, to engage in vertical foreclosure or to exercise monopsony power over video programming services. As an initial matter, existing and growing competition from non-cable MVPDs, which serve as alternative outlets for video programming, constrains the ability of *any* multiple system operator ("MSO") to engage in such conduct.[101] And, post-Merger, AT&T will control programming decisions or purchase

[100] Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd. 24284, ¶ 159 (Dec. 23, 1998) ("*Fifth Annual Video Competition Report*").

[101] *See generally* Stanley Besen and John Woodbury, "An Economic Analysis of the FCC's Cable Ownership Restrictions," at 5 (Aug 14, 1998) ("Besen and Woodbury") (attached to Comments of TCI, *In the Matter of Implementation of Section 11(c) of Cable Television Consumer Protection and Competition Act of 1992 – Horizontal Ownership Limits*, MM Docket No. 92-264 (Aug. 14, 1998)) ("TCI Ownership Limit Comments") ("[T]he ability to wield buyer power is diminished by the availability of alternative distribution outlets to which program suppliers can turn if a single cable operator, or a collection of operators, were to attempt to

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programming for a share of total MVPD subscribers that is far too small to support any plausible argument that AT&T could engage in such conduct.

a. Competition from alternative MVPDs constrains the ability of any MSO to engage in vertical foreclosure or exercise monopoly power

Today, consumers can choose from a variety of multichannel video providers, including DBS, telephone companies, C-Band, multichannel multipoint distribution services ("MMDS"), Satellite Master Antenna Television Systems ("SMATV"), and utilities. More than 12.5 million consumers, representing approximately 16 percent of all MVPD subscribers, now obtain multichannel video programming from some company other than their local cable operator, and more can potentially do so.[102] This non-cable video competition means not only additional choices for consumers but additional outlets for video programmers, the existence of which necessarily constrains the ability of any MSO to exercise monopsony power or to engage in vertical foreclosure.[103] In the MVPD business, there are numerous actual and potential video

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exercise such power. In particular, the rapid growth of DBS provides program suppliers with an increasingly important alternative to cable operators for the sale of their services."); *id.* at 8 ("[T]he effectiveness of a foreclosure strategy is further weakened if other distributors can carry a rival service the MSO tried to foreclose. In light of developments that have occurred since the passage of the 1992 Cable Act and the adoption by the Commission of rules limiting the size of MSOs – especially the rapid growth in the number of subscribers served by DBS operators – this factor places an especially important constraint on the ability of a large vertically integrated MSO to foreclose a rival program service.").

[102] Order and Authorization, *Tempo Satellite, Inc., Assignor and DirecTV Enterprises, Inc., Assignee*, IBFS File No. SAT-ASG-19990127-00014, (FCC May 28, 1999) ("*Tempo Authorization*").

[103] *See Fourth Annual Video Competition Report* ¶ 150 ("[a]s non-cable MVPD subscribership increases, the significance of DBS, MMDS, and SMATV operators in the MVPD purchasing

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programming buyers that currently would be "at least as significant a force" as the combined AT&T-MediaOne.

The growth of cable's competitors has been steadily increasing for several years. For example, in its 1998 annual report on the status of competition in the video marketplace, the Commission noted that the number of subscribers to non-cable MVPDs grew 18 percent between June 1997 and June 1998, while cable subscribership grew by only two percent over the same period.[104] Industry analysts expect this trend to continue and have estimated that the number of non-cable MVPD subscribers will reach 17.8 million, or approximately 22 percent of all MVPD subscribers, by next year.[105]

DBS. DBS is a formidable competitor in the MVPD marketplace, offering over 200 channels that include all the most popular and widely carried national cable networks, as well as some programming (such as DirecTV's exclusive sports packages) that is not available to local cable systems. In addition, the up-front consumer equipment costs for DBS have plummeted from $700 five years ago to little or nothing today. As the Department of Justice has observed:

> Cable and DBS are both MVPD products. While the programming services are delivered via different technologies, consumers view the services as similar and to a large degree substitutable. Indeed, most new DBS subscribers in recent years are former cable subscribers who either stopped buying cable or downgraded their cable service once they purchased a DBS system.[106]

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marketplace also increases . . . thus reducing cable operators' market power or influence in the purchase and distribution of network programming.").

104 *Fifth Annual Video Competition Report* ¶ 8.

105 *See, e.g., Cablevision Bluebook, Volume IX*, at 10 (Summer/Fall 1999).

106 Complaint, *United States v. Primestar, Inc.*, No. 1:98CV01193, ¶ 63 (D.D.C. May 12, 1998).